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(13)

No. 06-6330

2 4 2007

In The
Supreme Court of the United States

DERRICK KIMBROUGH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

JOINT APPENDIX
VOLUME I (Pages 1 to 101)

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RELEVANT DOCKET ENTRIES

KIMBROUGH v. UNITED STATES

United States District Court
Eastern District of Virginia (Norfolk)

CRIMINAL DOCKET FOR CASE #:
2:04-cr-00185-RAJ-TEM-2

09/13/2004	1	INDICTMENT RETURNED AND FILED IN OPEN COURT as to Joel Renato Flowers (1) count(s) 1, 2, 3, 4, 5; Derrick Kimbrough (2) count(s) 1, 2, 3, 4; On motion of the Govt., the Court directed warrant to be issued, no bond recommendation – Govt. to move for detention (arou) (Entered: 09/14/2004)

* * *

09/27/2004	6	ORDER Appointing Federal Public Defender for Derrick Kimbrough, entered & filed 9/27/04 (Signed F. Bradford Stillman, USMJ) (arou) (Entered: 09/27/2004)

* * *

01/11/2005	–	Plea Agreement Hearing as to Derrick Kimbrough held before Judge Raymond A. Jackson (Sharon Borden, OCR). USA appeared through: William Muhr, AUSA. Dft. present in custody appeared through: Riley H. Ross, III, AFPD. Dft. requested to withdraw plea of not guilty to counts 1,2,3 & 4 & enter a plea of guilty to said counts. Court fully advised dft. re proceedings & his rights & dft. acknowledged he understood. NO PLEA AGREEMENT. NO STATEMENT OF FACTS. Court explained to dft. that by pleading guilty he waived jury trial. Dft.

satisfied with services of counsel. Court Hours: 2:30-3:08 (popo) (Entered: 01/11/2005)

01/11/2005 – PLEA entered by Derrick Kimbrough. Court accepts plea by Derrick Kimbrough Guilty: Derrick Kimbrough (2) counts 1, 2, 3 & 4. Continued for PSR. Dft. remanded. (popo) (Entered: 01/11/2005)

* * *

03/10/2005 29 POSITION with Respect to Sentencing Factors by USA as to Derrick Kimbrough (arou) (Entered: 03/10/2005)

03/30/2005 30 RESPONSE by USA as to Derrick Kimbrough's sentencing position (arou) (Entered: 03/31/2005)

04/01/2005 31 POSITION with Respect to Sentencing Factors by Derrick Kimbrough (arou) (Entered: 04/01/2005)

04/11/2005 – Sentencing before Judge Raymond A. Jackson, USDJ held (Sharon Borden, OCR) USA appeared through: William Muhr, AUSA. Dft (in custody) appeared through: Gretchen Taylor (fpd) counsel for Derrick Kimbrough (2). Sentenced on count(s) 1, 2, 3, 4 (rlam) (Entered: 04/11/2005)

04/14/2005 32 JUDGMENT as to Derrick Kimbrough (2) count(s) 1: One Hundred Eighty (180) Months Imprisonment, to be served consecutively. Five (5) Years Supervised Release, to run concurrently. $100.00 Special Assessment; Count(s) 2.: One Hundred Twenty (120) Months Imprisonment, to be served consecutively. Five (5) Years Supervised Release, to run concurrently.

$100.00 Special Assessment; Count(s) 3: One Twenty (120) Months Imprisonment, to be served consecutively. Three (3) Years Supervised Release, to run concurrently. $100.00 Special Assessment; Count(s) 4: Sixty (60) Months Imprisonment [to] be served consecutively. Five (5) Years Supervised Release, to run concurrently. $100.00 Special Assessment; deft remanded to custody of USM, entered & filed 4/14/05 (Signed Judge Raymond A. Jackson) Copies Mailed: 4/14/05, ob (arou) (Entered: 04/14/2005)

* * *

04/21/2005 33 TRANSCRIPT filed in case as to Derrick Kimbrough for dates of 4/11/05 (Sentencing) (ptom) (Entered: 04/21/2005)

04/22/2005 35 AMENDED JUDGMENT: Derrick Kimbrough (2) Count 1: Imprisonment amended from 180 Months to One Hundred Twenty (120) Months to be served concurrently with Counts 2 & 3. Five (5) Years Supervised Release, to run concurrently. $100.00 Special Assessment. Count: 2. One Hundred Twenty (120) Months Imprisonment, to be served concurrently with Counts 1 & 3. Five (5) Years Supervised Release, to run concurrently. $100.00 Special Assessment. Count 3: One Twenty (120) Months Imprisonment, to be served concurrently with Counts 1 & 2. Three (3) Years Supervised Release, to run concurrently. $100.00 Special Assessment. Count 4: Sixty (60) Months Imprisonment to be served consecutively with Counts 1, 2 & 3.

Five (5) Supervised Release, to run concurrently. $100.00 Special Assessment. (Signed by Judge Raymond A. Jackson on 4/22/05) & filed on 4/22/05. Copies dist. (popo) (Entered: 04/25/2005)

* * *

05/12/2005 39 NOTICE OF APPEAL – Final Judgment by USA as to Derrick Kimbrough re [35] Amended Judgment. (ptom,) (Entered: 05/18/2005)

* * *

05/11/2006 53 Opinion of USCA vacating the sentencing and remanding to the District Court for resentencing, by unpublished per curiam, as to Derrick Kimbrough re [39] Notice of Appeal – Final Judgment. Filed in USCA on 5/9/06. (05-4554) (ptom,) (Entered: 05/16/2006)

05/25/2006 54 USCA NOTICE as to Derrick Kimbrough re [39] Notice of Appeal – Final Judgment. The mandate in this case will not issue at the scheduled time because a timely petition for rehearing has been filed. (05-4554) (ptom,) (Entered: 06/02/2006)

06/08/2006 55 ORDER of USCA denying appellee's petition for reharing [*sic*] en banc as to Derrick Kimbrough re [39] Notice of Appeal – Final Judgment. (05-4554) (ptom,) (Entered: 06/09/2006)

06/15/2006 56 JUDGMENT of USCA (certified copy) vacating the sentence and remanding to the District Court for resentencing as to Derrick Kimbrough re [39] Notice of Appeal – Final Judgment. The mandate

		issued in the USCA on 6/14/06. (05-4554) (ptom,) (Entered: 06/20/2006)
06/18/2007	57	TRANSCRIPT of Proceedings (Guilty Plea Hearing) as to Derrick Kimbrough held on January 11, 2005 before Judge Judge [*sic*] Raymond A. Jackson. Court Reporter: Sharon Borden, OCR. (ldab,) (Entered: 06/18/2007)

* * *

GENERAL DOCKET
US Court of Appeals for the Fourth Circuit

Court of Appeals Docket #: 05-4554

5/26/05	Criminal case docketed. (jhm)
	* * *
8/8/05	Brief and joint appendix filed by Appellant US. Copies of brf: 8 Sealed portion?[Y/N]: y # Brf pages: 25 # Apx Copies(include vol #'s): 6 of Vol. 1 # Sealed copies: 4 of Vol. 2 # Apx pages: 113 2-sided copying?[Y/N]: y Sufficient?[Y/N]: y Method of filing w/ court: PM Date of Service on parties: 8/8/05 Type of service on parties: PM [05-4554] ~ [4234522] Appellee brief due 9/1/05 for Derrick Kimbrough. (jhm)
	* * *
8/10/05	ORDER FILED [4234619] granting certificate to pl port of apx under seal [4234618-1] [05-4554] Copies to all parties. ~ [4234619] [05-4554] (jhm)
	* * *
9/15/05	Brief filed by Appellee Derrick Kimbrough. Copies of brief: 8 # brf pages: 50. Sufficient[Y/N]?: y. SEALED?[Y/N]: n. Method of filing w/ court: PM Date of Service on parties: 9/15/05 Type of service on parties: PM [05-4554] ~ [4256164] (jhm)
10/3/05	Reply brief filed by Appellant US. Copies of brief: 8 # brf pages: 19. Sufficient[Y/N]?: y. SEALED[Y/N]?: n. Method of filing w/ court: PM Date of Service on parties: 10/3/05 Type of service on parties: PM [05-4554] ~ [4266011] (jhm)

10/5/05	Case calendared for oral argument. Case calendared for oral argument on: 12/2/05. [05-4554] - [4266061] (jc)
11/14/05	Case removed from calendar. Counsel called?[Y/N]: y. [05-4554] (jc)

* * *

5/9/06	Unpublished per curiam opinion filed. Copies to all parties. [05-4554] (jhm)
5/9/06	Judgment order filed. Decision: Vacated and remanded. EOD Date: 5/9/06. - [4389006] [05-4554] (jhm)
5/23/06	Petition filed by Appellee Derrick Kimbrough for rehearing en banc. Number of copies filed: 20 [4398089-1] - [4398089] [05-4554] (jhm)
6/6/06	COURT ORDER filed [4405391] denying motion for rehearing en banc [4398089-1] EOD Date: 6/6/06. Copies to all parties - [4405391] [05-4554] (jhm)
6/14/06	Mandate issued. - [4409929] [05-4554] (jhm)
9/12/06	Supreme Court notice that petition for certiorari was filed on 09/05/06. Spct No.: 06-6330 Spct Pty 1: Derrick Kimbrough Spct Pty 2: United States. [05-4554] - [4459137] (mst)
6/19/07	Supreme Court order received granting petition certiorari [4459137-1] on 06/11/07. [05-4554] - [4600734] (dhb)

* * *

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

UNITED STATES OF AMERICA v. JOEL RENATO FLOWERS (Counts 1-5) DERRICK KIMBROUGH (Counts 1-4)	) CRIMINAL NO. 2:04CR)) 21 U.S.C. § 846) Conspiracy to Distribute) and Possess with) Intent to Distribute) Cocaine and Cocaine Base) (Count 1))) 21 U.S.C. § 841(a)(1)) Possession with Intent to) Distribute Cocaine and) Cocaine Base) (Counts 2 and 3))) 18 U.S.C. § 924(c)(1)) Possess Firearm in) Furtherance of a Drug) Trafficking Crime) (Count 4))) 18 U.S.C. § 922(g)(1)) Possess a Firearm as a) Convicted Felon) (Count 5))) 18 U.S.C. § 853) Criminal Forfeiture)

INDICTMENT

(Filed Sep. 13, 2004)

September, 2004 Term – at Norfolk, Virginia

COUNT ONE

THE GRAND JURY CHARGES THAT:

On or about May 24, 2004, in Norfolk, Virginia, in the Eastern District of Virginia, JOEL RENATO FLOWERS and DERRICK KIMBROUGH defendants herein, did unlawfully, knowingly and intentionally combine, conspire, confederate and agree with other persons both known and unknown to the grand jury, to commit the following offenses against the United States:

1. to unlawfully, knowingly and intentionally possess with intent to distribute 50 grams or more of a mixture or substance containing a detectable amount of cocaine base, commonly known as "crack" cocaine, a Schedule II narcotic controlled substance, in violation of Title 21, United States Code, Section 841(a)(1) and (b)(1)(A)(iii).

2. to unlawfully, knowingly and intentionally distribute approximately 50 grams or more of a mixture or substance containing a detectable amount of cocaine base, commonly known as "crack" cocaine, a Schedule II narcotic controlled substance, in violation of Title 21, United States Code, Section 841(a)(1) and (b)(1)(A)(iii).

3. to unlawfully, knowingly and intentionally possess with intent to distribute a quantity of a mixture or substance containing a detectable amount of cocaine, a Schedule II narcotic controlled substance, in violation of Title 21, United States Code, Section 841(a)(1) and (b)(1)(C).

4. to unlawfully, knowingly and intentionally distribute a quantity of a mixture or substance containing a detectable amount of cocaine, a Schedule II narcotic

controlled substance, in violation of Title 21, United States Code, Section 841(a)(1) and (b)(1)(C).

OVERT ACTS

In furtherance of the said conspiracy and to effect the objects thereof, the defendants committed at least one of the following overt acts, among others, in the Eastern District of Virginia:

1. On or about May 24, 2004, in Norfolk, Virginia, JOEL RENATO FLOWERS and DERRICK KIMBROUGH, did possess approximately 56 grams of "crack" cocaine for further distribution.

2. On or about May 24, 2004, in Norfolk, Virginia, JOEL RENATO FLOWERS and DERRICK KIMBROUGH, did possess approximately 92.1 grams of cocaine for further distribution.

3. On or about May 24, 2004, in Norfolk, Virginia, JOEL RENATO FLOWERS and DERRICK KIMBROUGH, did possess a firearm while possessing approximately 56 grams of "crack" cocaine and 92.1 grams of cocaine for further distribution.

4. On or about May 24, 2004, in Norfolk, Virginia, JOEL RENATO FLOWERS and DERRICK KIMBROUGH, did possess digital scales and packaging material.

5. On or about May 24, 2004, in Norfolk, Virginia, JOEL RENATO FLOWERS and DERRICK KIMBROUGH, did possess $15,103.00 U.S. Currency, representing drug proceeds.

(All in violation of Title 21, United States Code, Section 846)

COUNT TWO

THE GRAND JURY FU[R]THER CHARGES THAT:

On or about May 24, 2004, in Norfolk, Virginia, within the Eastern District of Virginia, JOEL RENATO FLOWERS and DERRICK KIMBROUGH, defendants herein, did unlawfully, knowingly and intentionally possess with intent to distribute approximately 56 grams of cocaine base, commonly known as "crack" cocaine, a Schedule II narcotic controlled substance.

(In violation of Title 21, United States Code, Section 841(a)(1) and (b)(1)(A)(iii) and Title 18, United States Code, Section 2)

COUNT THREE

THE GRAND JURY FURTHER CHARGES THAT:

On or about May 24, 2004, in Norfolk, Virginia, within the Eastern District of Virginia, JOEL RENATO FLOWERS and DERRICK KIMBROUGH, defendants herein, did unlawfully, knowingly and intentionally possess with intent to distribute approximately 92.1 grams of cocaine, a Schedule II narcotic controlled substance.

(In violation of Title 21, United States Code, Section 841(a)(1) and (b)(1)(C) and Title 18, United States Code, Section 2)

COUNT FOUR

THE GRAND JURY FURTHER CHARGES THAT:

On or about May 24, 2004 in Norfolk, Virginia, in the Eastern District of Virginia, JOEL RENATO FLOWERS

and DERRICK KIMBROUGH, did unlawfully and knowingly possess a firearm in furtherance of a drug trafficking crime, referenced in Counts One through Three of this indictment and incorporated herein, for which they may be prosecuted in a court of the United States.

(In violation of Title 18, United States Code, Section 924(c)(1) and Title 18, United States Code, Section 2)

COUNT FIVE

THE GRAND JURY FURTHER CHARGES THAT:

On or about May 24, 2004, in Norfolk, Virginia, in the Eastern District of Virginia, JOEL RENATO FLOWERS, having been previously convicted of a felony crime punishable by imprisonment for a term exceeding one year, did unlawfully and knowingly possess in and affecting commerce a firearm which had been shipped and transported in interstate and foreign commerce.

(In violation of Title 18, United States Code, Sections 922(g)(1) and 924(a)(2))

CRIMINAL FORFEITURE

THE GRAND JURY FURTHER CHARGES THAT:

A. The following defendants, JOEL RENATO FLOWERS and DERRICK KIMBROUGH, if convicted of any violation alleged in Counts One through Three of this indictment, shall forfeit to the United States:

1. Any and all property constituting, or derived from, any proceeds the defendant obtained, directly or indirectly, as the result of such violations; and

2. Any of the defendant's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of such violations.

(All in violation of Title 21, United States Code, Section 853)

B. The property subject to forfeiture under paragraph A, above, includes but is not limited to the following:

1. The sum of approximately $15,103, in the aggregate, representing the gross proceeds constituting, involved in, derived from, or traceable to the foregoing offenses that were seized in Norfolk, Virginia on May 24, 2004.

C. If any property that is subject to forfeiture, (a) cannot be located upon the exercise of due diligence, (b) has been transferred to, sold to, or deposited with a third person, (c) has been placed beyond the jurisdiction of the Court, (d) has been substantially diminished in value, or (e) has been commingled with other property that cannot be subdivided without difficulty; it is the intent of the United States to seek forfeiture of any other property of the defendant, up to the value described above, as subject to forfeiture under Title 21, United States Code, Section 853(p).

A TRUE BILL:

[signature redacted]
FOREPERSON

PAUL J. McNULTY
UNITED STATES ATTORNEY

By: /s/ W D Muhr

William D. Muhr
Assistant United States
Attorney
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Norfolk, Virginia 23510
(757) 441-6331

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

UNITED STATES OF AMERICA	)	
	)	CRIMINAL ACTION
V.	)	
	)	NO. 2:04cr185
DERRICK KIMBROUGH,	)	
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS

Norfolk, Virginia

January 11, 2005

(Guilty Plea Hearing)

Before: THE HONORABLE RAYMOND A. JACKSON
United States District Judge

Appearances:

WILLIAM D. MUHR, ESQUIRE
Assistant United States Attorney
Counsel for the United States

OFFICE OF THE FEDERAL PUBLIC DEFENDER
By: RILEY ROSS, ESQUIRE
Counsel for the Defendant

The defendant appearing in person.

Also Present:

Edward J. Allen, Probation Officer

[2] THE DEPUTY CLERK: Case No. 2:04cr185, United States of America versus Derrick Kimbrough.

Mr. Muhr, is the government ready to proceed?

MR. MUHR: The government is ready, Your Honor.

THE DEPUTY CLERK: Mr. Ross, is the defendant ready to proceed?

MR. ROSS: The defendant is ready, Your Honor.

THE COURT: All right. Good afternoon, ladies and gentlemen.

Mr. Ross, if you could come to the podium with Mr. Kimbrough, please.

Mr. Kimbrough, if you could take an oath, please.

(The defendant was sworn by the deputy clerk.)

DERRICK KIMBROUGH, having been first duly sworn, was examined and testified as follows:

EXAMINATION

THE COURT: All right. Mr. Kimbrough, you have taken an oath to tell the truth. If you answer any of the Court's questions falsely, your answers may later be used against you in a prosecution for perjury or making a false statement. Do you understand this, sir?

THE DEFENDANT: Yes, sir.

THE COURT: Will you state your full name for the record, please.

THE DEFENDANT: Derrick Kimbrough.

[3] THE COURT: And how old are you, sir?

THE DEFENDANT: Thirty-six, sir.

THE COURT: And how much formal education have you been provided?

THE DEFENDANT: Twelve years.

THE COURT: Have you been recently hospitalized for any type of mental illness or addiction to drugs of any kind?

THE DEFENDANT: No, sir.

THE COURT: Are you currently under the influence of any medication, narcotic, or any substance that hinders your memory?

THE DEFENDANT: No, sir.

THE COURT: The record reflects that you are here with Mr. Ross from the Federal Public Defender's Office. Have you had an opportunity to fully discuss the charges with him?

THE DEFENDANT: Yes, sir.

THE COURT: Are you fully satisfied with the advice and counsel that he offers?

THE DEFENDANT: No, sir.

THE COURT: Well, I ask you that question in regard if you have some differences with some of the advice he's given you?

THE DEFENDANT: Oh, no, sir.

THE COURT: Oh! Well, my question was, are you fully satisfied with the advice he's given you regarding the case?

[4] THE DEFENDANT: I'm sorry. I'm fully aware of what the advice is, but I'm not satisfied.

THE COURT: Okay. Well, I will continue to go on with the plea.

Now, do you have a copy of the indictment pending against you?

THE DEFENDANT: Yes, sir.

THE COURT: Has anyone in any way threatened you to get you to plead guilty?

THE DEFENDANT: No, sir.

THE COURT: Are you pleading guilty of your own free will?

THE DEFENDANT: Yes, sir.

THE COURT: So this is your decision to plead; is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Now, are you pleading guilty pursuant to a plea agreement or without a plea agreement?

Is this a plea agreement? Is this plea with a plea agreement or without a plea agreement?

MR. ROSS: It is my understanding, Your Honor, that my client wishes to plead without a plea agreement. That would be against my advice, which I believe is what he referred to with regard to satisfaction, but he would like to plead without a plea agreement and plead guilty to the four charges against [5] him in the indictment.

THE COURT: All right. Is that your position, Mr. Kimbrough?

THE DEFENDANT: Yes, sir.

THE COURT: Of course, you understand that Mr. Ross is schooled in the law and does this everyday?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Now, let's turn to the charges, then.

Do you require the Court, Mr. Kimbrough, to read each and every charge again, or do you understand each charge?

THE DEFENDANT: I understand each charge.

THE COURT: Okay. So you understand that in count one of the indictment you are charged with conspiracy?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. On this conspiracy charge, Mr. Kimbrough, this is a Class A felony. It carries a mandatory minimum prison term of ten years, a maximum imprisonment term of life, a fine of four million dollars, supervised release of five years, and a special assessment, that is, you have to pay a hundred dollars on each count upon which the Court receives or takes a guilty plea. Do you understand this?

THE DEFENDANT: Yes, sir.

THE COURT: Now, when I referred to a period of [6] supervised release, the period of supervised release

always commences or starts after your term of imprisonment has ended.

On count one, the term of supervised release is five years. If you are placed on supervised release, you will be given certain standards and conditions to meet while you are under the supervision of the Court. If you violate those standards and conditions, the Court has the discretion to revoke your period of supervised release and return you to prison for the full term you would have been on supervised release. Here that's five years. Do you understand this?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Now, let's turn to the next count, count two, which charges you with possession with intent to distribute cocaine base on or about the 24th of May, 2004. This offense is also a Class A felony, Mr. Kimbrough.

You are pleading to count two, right?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. It's a Class A offense. It has a mandatory minimum imprisonment term of ten years, a maximum term of life. It has identical punishment as the Court provided or gave you on the first count, on the conspiracy count. Do you understand this?

THE DEFENDANT: Yes, sir.

THE COURT: The same thing I told you about the conspiracy count applies to count two.

[7] Now, you have a five-year period of supervised release there, but the periods of supervised release would run concurrently. In other words, they would run at the

same time. So while you might be out of prison on, let's say, all four charges, the period of supervised release would all run concurrently, at the same time. Okay?

THE DEFENDANT: Um-hum.

THE COURT: Now, count three –

Wait a minute. What was count two again? Let's go back here to be sure we are straight.

Count two charged you with possession with intent to distribute cocaine base, so the penalty there was much harsher than count three in which you are charged with possession with intent to distribute straight cocaine. That charge carries a maximum imprisonment term of 20 years, a fine of $1,000,000, a minimum supervised release term of three years, and again, a $100 special assessment. But again, the period of supervised release, though it's three years, would run concurrently or at the same time the period of supervised release runs on count one and count two. But do you see the distinction in terms of the punishment? Crack cocaine carries a stiffer penalty than straight cocaine does.

Now, let's turn to count four, which charges you with possession of a firearm in furtherance of a drug-trafficking crime. This is also a Class A felony, that is, count four. [8] The minimum sentence is five years. The maximum is life. The maximum fine is $250,000. And, again, the period of supervised release is five years, and, of course, there's a $100 special assessment. That's the punishment that you would be exposed to on count four.

In all likelihood if you are sentenced on all of these counts, the Court runs the time concurrently. Most of the

times it runs concurrently, that is, at the same time. It's not end to end; it's concurrent.

Now, each of these offenses, Mr. Kimbrough, is a felony offense, and you see that because they carry more than a year in jail. Each is a felony offense. Have you ever been convicted of a felony before?

THE DEFENDANT: No, I haven't.

THE COURT: You have not?

THE DEFENDANT: No.

THE COURT: If the Court accepts your plea to each of these charges, or any one of them, each offense is a felony offense and if you are convicted of a felony offense in the Commonwealth of Virginia, you are deprived of certain civil rights. Among them would be your right to vote, your right to possess a firearm, your right to seek public office, if you ever decided you wanted to run for some public office at some time in the future, your right to be a notary. Those are some of the rights you would lose if you become a convicted felon, [9] and the only way you would get your rights restored is to finish all of your time, all of your supervised release, and then to petition the Commonwealth of Virginia to restore your rights as a citizen. That's a very long and cumbersome process. Do you understand this?

THE DEFENDANT: Yes, sir.

THE COURT: Now, have you talked to Mr. Ross about how the sentencing guidelines might affect you?

THE DEFENDANT: Yes, sir.

THE COURT: So you understand we need a presentence report –

THE DEFENDANT: Yes, sir.

THE COURT: – to arrive at the sentencing guideline for each one of these sentences?

Once we get the report, you and Mr. Ross will have the opportunity to check the accuracy of that report, that is, whether the guidelines are applied correctly and the facts in the report. The United States attorney will have the same opportunity. Then we will come back to Court, and the Court will resolve any objections the parties have in order to arrive at the applicable sentencing guidelines.

Now, once we arrive at a sentencing guideline, the law provides the Court with an opportunity under some circumstances to depart from the guideline, that is, to not follow it. If the Court departs from the guideline, it means I [10] can give you a lower sentence, if the Court departs downward from the guidelines. In other words, I'm giving you a lesser penalty. If the Court decides that no, I'm going to depart upward, then the Court will give you a stiffer sentence than what the guidelines suggest.

The Court doesn't know that that's going to happen in your case, but it's not an unusual thing for the Court to depart from the guidelines. Do you understand what I'm saying?

THE DEFENDANT: Yes, sir.

THE COURT: The Court will also, Mr. Kimbrough, have to look at all provisions of the guidelines that might apply to you. That means from time to time we have what we refer to as enhancements. There is certain conduct you

can engage in when you commit the offense that will cause your punishment to be a little bit stiffer. So any enhancements that apply will be considered in the case.

The Court would look at what is referred to as relevant conduct, in other words, everything you have done regarding these offenses. The Court can even look at uncharged misconduct. In other words, if you distributed some more drugs someplace or had some more drug weight someplace, the Court can consider those drugs or the weight of those drugs in deciding what your offense level should be or how stiff the punishment would be, even though you haven't plead guilty to those instances of having drugs. So that's an example of the Court [11] being able to look at what we refer to as relevant conduct.

In other words, the Court will look at any conduct in which you encouraged, aided, abetted or participated in this offense, or any criminal conduct that you should have reasonably anticipated while you were involved in committing these offenses. So you should be aware that other things may come up other than just the four charges you are pleading guilty to. Do you understand what I'm telling you?

THE DEFENDANT: Yes, sir.

THE COURT: All right.

Now, are you aware, Mr. Kimbrough, that there is no parole in federal prison?

THE DEFENDANT: Yes, sir.

THE COURT: You get approximately 52 days off good time as a prisoner, but other than that, you are

expected to serve all the time you are sentenced to if you go to federal prison.

Do you understand you have a right to plead not guilty to each of these charges and to persist in your not guilty plea and go right on to trial on Thursday?

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: If you go to trial, you have a right to be tried by jury, a right to be defended by Mr. Ross. If you could not afford to bring witnesses to trial, the Court would [12] pay the cost for you to subpoena witnesses to trial. You would have the right to cross-examine and confront each witness at trial through your counsel.

You would have the right on your part to remain silent, if you chose to do so. If you chose not to testify, the U. S. attorney would not be able to comment on your silence to the jury in order to get you convicted. You have a constitutional right to remain silent.

As I indicated, the government has to prove your guilt beyond a reasonable doubt because you would walk into the trial with a presumption of innocence. That presumption of innocence would remain with you throughout the trial unless the government could prove your guilt beyond a reasonable doubt on these charges.

Now, Mr. Kimbrough, if you persist in this plea and the Court accepts your plea to each of these charges, you would have waived or given up all these rights associated with a trial that the Court has just outlined. Do you understand this?

THE DEFENDANT: Yes, sir.

THE COURT: Now, have you talked thoroughly with Mr. Ross about waiving your rights to go to trial – the rights you would have at trial?

Do you understand my question? Have you discussed with Mr. Ross the matter of waiving your right to go to trial [13] and entering this plea? Have you thoroughly discussed this?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand your right to go to trial?

THE DEFENDANT: Yes, sir.

THE COURT: Do you wish to give up these rights and enter a plea to these charges?

THE DEFENDANT: Yes, sir.

THE COURT: Now, I want you to understand this. It's not unusual for defendants to come back after they have been convicted and blame the lawyer for all kinds of things they didn't understand, and what will happen is what you tell me here today on this record will be used to rebut those arguments. So it's up to you whether you enter a plea or not. It's not up to the lawyer; it's up to you. It's your decision. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Now, when you go to trial, Mr. Kimbrough, the government has to prove your guilt beyond a reasonable doubt by proving certain critical elements of the crime or facts on each crime in order to

prevail, and I'm going through what they would have to prove on each one of these four counts.

On the conspiracy count, first of all, let me tell you that conspiracy is a fancy term probably to you, but it's [14] nothing more than an agreement between two people or more to commit a crime or do something that the law prohibits. Here the alleged conspiracy was to engage in the distribution and possession of drugs, the cocaine and crack cocaine, and the conspiracy was allegedly between you and your codefendant in this case.

Now, the government would first have to prove that there was a conspiracy between two or more persons as described in this indictment. That's the first thing they have to show.

Secondly, they would have to show that at some time during the life of this conspiracy, this agreement to violate the law by distributing and trafficking in drugs, you, knowing the purpose of that conspiracy, voluntarily became a member of it, participated in it. That's all they have to show: the existence of the conspiracy and your voluntary membership in the conspiracy once you knew the purpose of it.

If they can prove those two critical facts beyond a reasonable doubt, it would be sufficient for a jury to convict you of conspiracy to unlawfully, knowingly and intentionally possess with intent to distribute cocaine base and cocaine as set forth in this indictment.

Now, any questions about the first charge?

THE DEFENDANT: No, Your Honor.

THE COURT: On the second charge where you are charged in count two with possession with intent to distribute [15] cocaine base, the government would have to prove three critical elements: First, that you possessed cocaine base;

Second, that you knew this was cocaine base; and

Thirdly, that you intended to distribute the substance. That's all they have to prove.

On count three where you are charged with possession with intent to distribute cocaine, the government likewise has to prove that you possessed cocaine;

Secondly, that you knew it was cocaine; and

Thirdly, that you intended to distribute this cocaine. They have to prove those three elements beyond a reasonable doubt.

Finally, with respect to count four where you are charged with the knowing and unlawful possession of a firearm in furtherance of a drug-trafficking crime, the government has to prove, first of all, that you possessed a firearm;

Secondly, that you possessed that firearm during and in relationship to a drug-trafficking crime – no, I'm sorry, that you possessed the firearm in furtherance of a drug-trafficking crime. The drug-trafficking crime they are referring to here is the possession with intent to distribute cocaine, the possession with intent to distribute cocaine base, and conspiracy. Those are the three charges.

And finally, on count four they would have to prove that the crime for which you possessed this firearm, that

is, [16] the drug-trafficking crime, is one that could be prosecuted in a court of the United States. And clearly those three charges in counts one, two and three are offenses that can be prosecuted in a court of the United States. So those are the things that they would have to prove on count four.

Now, do you have any questions about what the government has to prove?

THE DEFENDANT: No, sir.

THE COURT: The Court needs to determine whether there's a factual basis for this plea. Is there any written agreement, or proffer, or anything of that nature?

MR. MUHR: Your Honor, I do have a written agreement here, but I'm not certain he's willing to sign this one.

MR. ROSS: Your Honor, the written agreement that we have now, actually it would support two of the charges, the possession with intent to distribute cocaine and possession with intent to distribute cocaine base, and they were actually drafted pursuant to the plea agreement which covered those two charges. The facts would need to be – we would need to add facts to support a guilty plea to the third count.

THE COURT: Let me ask you. Has he signed it?

MR. ROSS: He has not, Your Honor, only because we were not sure on how the Court would want to proceed, and we have not signed it.

THE COURT: Okay. Then here's the situation. The [17] Court will have to find out whether there's a factual basis from the United States.

You will have to stand up and make a proffer, then, Mr. Muhr.

MR. MUHR: Yes, sir, I will, Your Honor.

THE COURT: All right. You may have a seat while he makes a proffer.

MR. MUHR: Your Honor, this is a case that, obviously, the Court is actually probably somewhat familiar with, or actually probably very familiar with the facts seeing that there was a suppression hearing on this.

On this particular case, Your Honor, I would just go over the facts that were presented at that suppression hearing.

Your Honor, on May 24th around 10:45 p.m., the Norfolk Police Officers Ball and Rutherford, they were patrolling the 700 block of Lexington Street in Norfolk. This is a well-known, high drug-trafficking area.

The officers, they observed a parked station wagon and that there was a male crouched outside of this wagon. When the male, what appeared to them, when the male saw them, he quickly took off running into an apartment complex.

The officers took their car and went over to try to figure out where this male went, could not, and came back to the car. In the car was the defendant, who was in the driver's [18] seat, along with his codefendant, Flowers. They inquired of Mr. Flowers and Mr. Kimbrough if they

knew why the male took off running? Both of them stated they did not know.

The police observed in Mr. Kimbrough's lap a large amount of cash, which was later counted and was $125. It was just sprawled out on his lap.

One of the officers was on one side watching Mr. Kimbrough, and the other was on the other side watching Mr. Flowers. Officer Rutherford, he was on the side watching Mr. Flowers, and he noticed Mr. Flowers making a furtive movement with this like maroon-colored leather bag. At the time he didn't know what he had, but he was making this type of movement, moving to the side of him. Based on the circumstances so far, they were concerned for their safety and so they asked if they would step out of the car, and both of them did comply and did step out of the car.

As they stepped out of the car, the officer noticed immediately the maroon bag in the area where Mr. Flowers was making those furtive movements. He took the bag, and as he opened the bag, immediately he could see in there a very large amount of cash and a very large amount of drugs that was [*sic*] in the bag.

He didn't say anything to them. He opened it, looked, and then started to step out, and as soon as he did, both of them took off in opposite directions from each other. [19] They went after these individuals, catching them not too far from where they went.

As they were running, Mr. Flowers, he took out a gun, and he ended up tripping and the gun ended up flying out of his hands. It fell on the sidewalk. The clip came out, and the bullets scattered about on this.

Inside that leather bag, there was a very large amount of money and a very large amount of crack cocaine that was in that bag. In addition, there was an automobile receipt in the name of Joel Flowers that was in that bag along with an NADA book.

In the console area, they found also a large amount of drugs that was in the console area. That included both powder and crack cocaine. In addition, there was a large bag on the floor, which itself contained a very large amount of cash. It was a black plastic bag sitting on the floor that contained a large amount. The total amount of cash in this was about $15,100 in cash that was in the car. The total amount of drugs on this – of the cocaine, it was 92.1 grams, and of the crack cocaine it was approximately 56 grams.

Mr. Kimbrough was searched afterwards and as he was searched, on him was electronic scales in addition to $1,823. He also had a loaded .380 magazine on him, a razor blade in a film canister that was filled with a bunch of empty baggies, and he had a cell phone.

[20] Mr. Flowers, he was also searched, and on him was $1,655. Also contained within the drugs, too, there was a set of baggies that was in the drugs that were not yet used that was contained within the compartment of the drugs.

All the drugs were analyzed and sent to the lab, with the results that I had stated earlier. The intent to distribute on this would have been, based on expert testimony, based on the drug quantity and the presence of the large amount of cash, electronic scales, guns, empty baggies, razor blades and just the circumstances alone being in a high drug-trafficking area. And the gun in question was

not manufactured in Virginia; and, therefore, it did cross over state lines. I know that doesn't affect Mr. Kimbrough, but that affects Mr. Flowers.

Both of them gave a statement, but neither of them at the time admitted up to any of the drugs and said they didn't run. But Mr. Flowers did say that the NADA book was his, along with some paperwork that he had that was his.

Your Honor, that's the gist of the argument and the facts in this case.

THE COURT: All right. I thank you.

Would you return to the podium, Mr. Kimbrough.

All right. Mr. Kimbrough, the government has given a summary of what evidence they believe would be adduced to establish your guilt if you went to trial.

[21] Mr. Ross, does Mr. Kimbrough have a meritorious defense to either of these counts?

MR. ROSS: I don't believe so, Your Honor. But he would disagree with several of the facts as stated by the government and at least not admit those, but he would agree that there's enough information – or he would, if the Court needs, offer information to support his guilty pleas. I do not think he has a defense to these charges, but I would like to go on record stating that he does not agree with the proffer made by the government on several factors.

THE COURT: Well, I don't know that it requires that he agree with it, but he disagrees with some of the proffer?

MR. ROSS: Exactly, Your Honor, but not to the extent that it would jeopardize his guilty plea.

THE COURT: Okay. I don't know whether he disagrees with some essential element. Does he disagree with any essential element?

MR. ROSS: He does not, Your Honor. I could go count by count, if the Court would like.

THE COURT: No, as long as he doesn't disagree with an essential element. He can disagree with some other things, so long as he doesn't disagree with an essential element.

MR. ROSS: I would say, Your Honor, just for the record, with regards to count one, the conspiracy count, Mr. Kimbrough does admit that he conspired with others [22] regarding the underlying drug activity. However, that is not an admission that he conspired with Mr. Flowers.

THE COURT: Okay. That's fine.

Mr. Kimbrough, how do you plead to count one of the indictment?

THE DEFENDANT: Count one?

THE COURT: Conspiracy.

MR. ROSS: Your Honor, if I could, before we go through these, I would also like to point out something with regards to count four, and I bring this to the Court's attention and I would like to, again, go on record saying these pleas that Mr. Kimbrough are about to enter are against my advice.

From what I understand, there's going to be, after this guilty plea session concludes, an opportunity for Mr. Kimbrough possibly to testify later in Mr. Flowers' trial. For that reason, Your Honor, I just wanted to make the record clear here, because this record may become a substantial piece of evidence with regards to any later testimony he may give. As I stated, with regards to the conspiracy count, he is not making any admission he conspired with Mr. Flowers.

Additionally, with regards to the firearm, count four, the 924(c) count, if called to testify, it's my understanding that Mr. Flowers would represent that he was in possession of a firearm that evening, of the firearm in [23] question.

I wanted to bring that out on the record, Your Honor. In the case of any further testimony that may come from Mr. Kimbrough, this proceeding here may be called into evidence, and what he said and did not say may impact on him in some way.

THE COURT: Are you saying he would say he was in possession of the firearm in count four, or he was not?

MR. ROSS: Your Honor, if the Court would put it to him. But from my understanding, he would indicate that he was in possession.

THE COURT: Okay. If he was in possession of it, then I don't see what the problem would be here.

MR. ROSS: Thank you, Your Honor.

THE COURT: All right. Mr. Kimbrough, how do you plead to count one, which charges you with conspiracy?

Mr. Kimbrough?

THE DEFENDANT: Yes, sir.

THE COURT: How do you plead to count one, which charges you with conspiracy?

THE DEFENDANT: Guilty, Your Honor.

THE COURT: How do you plead to count two, which charges you with possession with intent to distribute 56 grams of cocaine base on or about May 24th, 2004?

THE DEFENDANT: Guilty.

[24] THE COURT: How do you plead to count three, which charges you with possession with intent to distribute 92.1 grams of cocaine on or about May 24th, 2004?

THE DEFENDANT: Guilty.

THE COURT: And finally, how do you plead to count four, which charges you with unlawful and knowing possession of a firearm in furtherance of a drug-trafficking crime on the same day of May 24th, 2004?

THE DEFENDANT: Guilty.

THE COURT: It is the finding of the Court in the case of United States of America versus Derrick Kimbrough that the defendant is fully competent and capable of entering an informed plea, the defendant is aware of the nature of the charges and the consequences of his plea to each of the four charges in the indictment, that

the defendant's plea to each of the counts, one, two, three and four, is a knowing and voluntary plea supported by an independent basis in fact, containing the essential elements of the offense.

That being the case, your plea is accepted, Mr. Kimbrough, and you are hereby adjudged guilty of counts one, two, three and four of the indictment.

It will be necessary to schedule you for a disposition in this case. The Court's looking at a deposition date and time of around 11:30 on the 11th, Mr. Ross and Mr. Muhr.

[25] MR. MUHR: Which date, Your Honor?

THE COURT: 11:30 a.m. on 11 April.

MR. ROSS: That's fine with the defense, Your Honor.

MR. MUHR: I can do that, Your Honor.

THE COURT: All right. Fine.

I'm sending a sentencing procedures order out.

All right. Mr. Ross, are there any other matters to come before the Court?

MR. ROSS: No, Your Honor. Thank you.

THE COURT: Mr. Muhr?

MR. MUHR: No, Your Honor.

THE COURT: All right. Then the Court will be in recess until further notice.

(This hearing concluded at 3:10 p.m.)

CERTIFICATION

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

X Sharon B. Borden X
Sharon B. Borden, RMR, FCRR

X June 18, 2007 X
Date

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

UNITED STATES OF AMERICA,	)	
v.	)	CRIMINAL NO. 2:04cr185
DERRICK KIMBROUGH	)	

POSITION OF THE UNITED STATES
WITH RESPECT TO SENTENCING FACTORS

(Filed Mar. 10, [illegible])

Upon review of the Presentence Investigation Report, the United States has no objections to and does not dispute any facts or factors material to sentencing in the presentence report.

Respectfully submitted,

Paul J. McNulty
United States Attorney

By: W D Muhr
William D. Muhr
Assistant United States Attorney
8000 World Trade Center
101 W. Main Street
Norfolk, Virginia 23510
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CERTIFICATE OF SERVICE

I certify that on March 10, 2005, a true and correct copy of the "POSITION OF THE UNITED STATES WITH RESPECT TO SENTENCING FACTORS" was delivered to

Sean C. Mitchell, the probation officer handling this case, and mailed to the following counsel for the defendant:

Riley H. Ross, Esquire
150 Boush Street, Suite 403
Norfolk, VA 23510

/s/ W D Muhr
William D. Muhr
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

UNITED STATES OF AMERICA,	)	
v.	)	CRIMINAL NO. 2:04cr185
DERRICK KIMBROUGH	)	

GOVERNMENT'S RESPONSE TO
DEFENDANT'S SENTENCING POSITION

(Filed Mar. 30, [illegible])

The United States of America, by and through its attorney, Paul J. McNulty, United States Attorney for the Eastern District of Virginia, and William D. Muhr, Assistant United States Attorney, comes in response to defendant's sentencing position. Defendant opposes Paragraphs 18-21 of the Presentence Report wherein he is assessed a two-point enhancement for obstruction of justice pursuant to Section 3C1.1 of the U.S.S.G. and denied a two-point reduction for acceptance of responsibility pursuant to Section 3E1.1. The factual basis for the enhancement for obstruction of justice and the denial for acceptance of responsibility are both based on the defendant's testimony at the trial of co-defendant Joel Flowers. At the trial the defendant testified in sum that he was guilty of all the charged offenses because all the incriminating evidence belonged to him while Flower[s] was innocent of all the charged offenses because none of the incriminating evidence belonged to him nor was he aware of its presence. It is the government's position that the defendant committed perjury during the course of his testimony therefore he is

properly assessed a two-point enhancement for obstruction of justice and properly denied a two-point reduction for acceptance of responsibility.

Section 3C1.1 authorizes a two-point enhancement for obstructing or impeding the administration of justice or attempting to do so. The obstruction can occur during any stage of a case including the investigation, the actual prosecution or the sentencing. Commentary #4(b) lists the committing, suborning, or attempting to suborn perjury as an example of conduct that merits an enhancement for obstruction of justice. In *United States v. Dunnigan,* 507 U.S. 87 (1993), the Supreme Court defines perjury as "false testimony concerning a material matter with the willful intent to provide false testimony." Id. at 87. It is the government's position that defendant did falsely testify to a material matter with the intent to do so and therefore committed perjury.

In the instant case, the facts of the case and the physical evidence clearly pointed to the culpability of Joel Flowers which was verified by the jury's verdict. However the defendant in a deliberate and calculated manner attempted to convince the jury that Flowers was merely a victim of his circumstances and was not culpable. In his attempt to exonerate Flowers he systematically attempted to explain away every fact or detail that pointed to Flowers' culpability. He told the jury that he did not know the unknown man who was standing by his automobile and who fled when the police arrived and that no drug transaction occurred between them even though defendant was found with $125 of U.S. currency sprawled on his lap, the price of an 8-ball. He told the jury that Flowers did not make any furtive movements attempting to hide the maroon bag that contained a large amount of cocaine,

$5000, paperwork in Flowers' name and an NADA book that Flowers admitted belonged to him. He told the jury that he, not Flowers, put the NADA book and the paperwork in Flowers' name in the maroon bag for safekeeping because Flowers had accidently left them in the automobile earlier that day. He told the jury that Flowers was completely unaware of the drugs and money in the maroon bag; completely unaware of the $6500 in a plastic bag located at his feet; completely unaware of the additional large amount of U.S. currency and drugs, plus scales and packaging material found elsewhere in the automobile. He told the jury that Flowers did not take off running as a result of the police discovering the contents of the maroon bag without communicating to Flowers the results of their discovery. He told the jury that Flowers never possessed or knew about the handgun and the police did not recover the gun as a result of a foot pursuit of Flowers wherein Flowers threw it to the ground. In his attempt to explain away the gun, defendant stated on direct examination that he possessed the gun and while he and Flowers were walking across the grass to get to his car he felt the gun slip out of the holster as a result of a rip in the holster from a botched sewing job he had done on the holster earlier. The defendant even pointed to the exact spot where the gun slipped out on an overhead map and stated that it made a noise when it hit the ground. The holster was introduced into evidence by the government and clearly does not have any rips and the stitching is clearly the original machine stitching from the manufacturer. On cross-examination when the defendant was asked why he did not pick the gun up, he changed his story and said he was unaware that the gun slipped out of the holster while he was crossing the grass, but discovered it missing when an unknown individual stood at his car door and he attempted to pull

out the gun for protection. Clearly, there is ample evidence that defendant intentionally gave false testimony to the jury on material facts for the purpose of exonerating Flowers and therefore is rightly attributed with a two-point enhancement for obstruction of justice.

Commentary #4 of Section 3E1.1 states that a defendant who receives an enhancement for obstruction of justice ordinarily indicates that he has not accepted responsibility and therefore is not entitled to a reduction. The defendant claims that even if he is given a[n] enhancement for obstruction of justice that he is still entitled to acceptance of responsibility because his case fits into the extraordinary exception. The defendant argues that he pled guilty to all counts of the indictment, but could have avoided doing so if he had taken advantage of the offered plea agreement which required him to plead guilty to only the conspiracy count and therefore he accepted responsibility to counts in the indictment beyond what was required of him in the plea agreement. Therefore, even if he did obstruct justice he accepted responsibility beyond what was required of him in the plea agreement making this an extraordinary case and thus entitles him to a two-point reduction for acceptance of responsibility.

The defendant's argument attempts to view the acceptance of responsibility and the obstruction of justice as two separate and unrelated events and if he accepts responsibility to counts that he could have avoided in a plea agreement that this makes it an extraordinary case and entitles him to receive acceptance of responsibility even if he did obstruct justice. It would seem that an example of an extraordinary case that would entitle a defendant to acceptance of responsibility even though he receives an enhancement for obstruction of justice is one

wherein the defendant makes a good faith effort to amend for his previous acts for obstruction of justice. A possible example would be a defendant who impeded justice at the investigation stage that merited an obstruction of justice enhancement, but later pleads guilty and testifies truthfully against his co-defendants at trial. The defendant has taken no action to make amends for his obstruction of justice and his conduct indicates that he has not accepted responsibility. He has clearly denied relevant conduct which includes his involvement with Flowers in a drug conspiracy and Flowers' involvement in the conspiracy.

A Fourth Circuit case almost on point is *United States v. Murray*, 65 F.3d 1161 (4th Cir. 1995). That case involved two defendants named Murray and Johnson who were both indicted for four bank robberies. Johnson, in a written confession admitted to her role in the bank robberies and that of her co-defendant Murray. Murray in an oral confession admitted to his role in the bank robberies. Johnson then entered a guilty plea to the robberies, while Murray insisted on a trial. At the trial Johnson testified that she could not remember making any statements in a written confession to the police that Murray was involved in the robberies because her memory was impaired from drug use. She also denied her signature on her written confession. The Fourth Circuit affirmed the District Court's ruling to enhance Johnson for obstruction of justice because the court found that Johnson deliberately committed perjury during her testimony at trial and her excuse of possessing a faulty memory because of drug use was not credible. Clearly in the instant case the perjurious testimony of the defendant was even more egregious than that of defendant Johnson. Defendant Johnson simply denied any memory of her earlier confession of the involvement of

Murray, while in the instant case, defendant Kimbrough affirmatively testified that Flowers had no involvement with the conspiracy, the drugs, the gun or any of the other incriminating evidence.

In the same case, Johnson argued that she should receive a reduction for acceptance of responsibility because she pled guilty to the robberies and thus accepted responsibility. The District Court ruled that even though Johnson pled guilty and admitted to her role in the bank robberies, she denied her earlier written statement wherein she told the police of the involvement of her co-defendant Murray in the robberies and thus she misled the law enforcement officers. The Fourth Circuit found no error in the District Court's ruling making reference to U.S.S.G. Section 3E1.1, comment. (n.5) that since Johnson received an obstruction of justice enhancement it normally indicates that she has not accepted responsibility because she is denying relevant conduct such as her involvement with Murray in the bank robberies and Murray's involvement in the bank robberies. In the same manner, in the instant case, the defendant even though he pled guilty to all counts in the indictment he has denied relevant conduct which includes his involvement with Flowers in the conspiracy and Flowers' involvement in the conspiracy. Clearly defendant's conduct is inconsistent with someone who accepts responsibility.

CONCLUSION

For the reasons state[d] and the authority cited the defendant should be enhanced for obstruction of justice and denied acceptance of responsibility because of his perjurious testimony. This position is consistent with the

rationale of the Sentencing Guidelines because no defendant should be rewarded for committing perjury.

Respectfully submitted,

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UNITED STATES ATTORNEY

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of March 2005, a true copy of the foregoing Response was mailed to defendant's attorney, Riley H. Ross, Federal Public Defender's Office, Town Point Center, Suite 403, 150 Boush Street, Norfolk, Virginia 23510 and Sean C. Mitchell, Senior U.S. Probation Officer, 600 Granby Street, Suite 200, Norfolk, Virginia 23510.

/s/ W D Muhr
William D. Muhr
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

UNITED STATES OF AMERICA,	:	
v.	:	Case No. 2:04cr185
DERRICK KIMBROUGH	:	

POSITION OF PARTIES WITH RESPECT TO THE SENTENCING FACTORS

(Filed Apr. 1, [illegible])

COMES NOW the defendant, Derrick Kimbrough, by counsel, in accordance with Section 6A1.2 of the Sentencing Guidelines and Policy Statements as well as this Court's sentencing Order, and hereby notes his objections to the Probation Office's advisory pre-sentence report ("PSR") and states his sentencing position.

Obstruction of Justice Enhancement

The PSR subjects Mr. Kimbrough to a 2-point enhancement for "his attempts to obstruct or impede justice." The enhancement is based entirely on the Government's allegation that Mr. Kimbrough offered false testimony during the trial of co-defendant Joel Flowers in an attempt to exonerate Mr. Flowers. However, Mr. Kimbrough has not been charged, much less convicted, of such an offense. Moreover, the jury acquitted Mr. Flowers of possessing with the intent to distribute more than 50 grams of cocaine base. As such, it cannot be said that the jury believed Mr. Kimbrough lied when he testified.

Acceptance of Responsibility

The PSR fails to reduce Mr. Kimbrough's offense level for Acceptance of Responsibility despite the fact that he pled guilty to each offense in which he was charged and has accepted responsibility for his role throughout all proceedings. The PSR notes that the Acceptance of Responsibility determination hinges on the Court's ruling on the Obstruction of Justice issue. However, it should be noted that the advisory Guidelines allow for adjustments under both categories in extraordinary circumstances. *See* U.S.S.G. § 3E1.1 cmt. n4. Here, Mr. Kimbrough did the extraordinary in turning down a plea offer to dismiss Count 4 – an 18 U.S.C. § 924(c) charge carrying a mandatory 5-year sentence that must run consecutive to the sentence resulting from the remaining counts. Instead, Mr. Kimbrough chose to plead guilty to each count against him, without the benefit of a plea agreement. As such, despite the Court's ruling on the Obstruction of Justice enhancement, Mr. Kimbrough has demonstrated extraordinary acceptance and should receive the appropriate reduction to his advisory guideline range.

Sentencing Position

As this Court is well aware, *United States v. Booker*, 125 S. Ct. 738 (2005), did away with the mandatory nature of the federal sentencing guidelines. The result is that district courts must now impose a sentence that is "sufficient but not greater than necessary" to achieve the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2). *See* 18 U.S.C. § 3553(a). Specifically, courts must consider the need for the sentence imposed –

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

18 U.S.C. § 3553(a)(2).

If the Court's sentence is to reflect the seriousness of the offense, promote respect for the law and provide a just punishment for the offense, the impact of the powder-crack cocaine disparity must be addressed. The sentence called for by the guidelines is driven largely by the weight of and type of drug. Here, Mr. Kimbrough is attributed with possessing 56 grams of cocaine base, or "crack" cocaine and 92.1 grams of powder cocaine. Using the 100 to 1 ratio advocated by the Guidelines, the probation officer converted the crack cocaine to powder cocaine for a total of 5,692.1 grams or 5.69 kilograms of powder cocaine. This weight resulted in an Offense Level of 32 and when coupled with Mr. Kimbrough's Criminal History Category of II results in a Guideline Range of 135-168 months.[1] On the other hand, if the weight of the drug remained the

[1] This computation does not include adjustments pursuant to the Obstruction of Justice and Acceptance of Responsibility categories. If the PSR recommendations are followed as to these categories, the resulting Guidelines Range would be 168-210 months.

same (148.1 grams), but Mr. Kimbrough was in possession of only powder cocaine, the resulting Offense Level would be 18. *See* U.S.S.G. § 2D1.1(c)(11). When paired with a Criminal History Category of II, Mr. Kimbrough would be facing a Guidelines Range of 30-37 months.[2] Thus, it is apparent that the crack cocaine sentencing scheme with its 100-to-1 ratio generates unjustifiable disparities in sentencing.

This disparity in sentencing has long been criticized by courts, *see United States v. Dumas*, 64 F.3d 1427, 1432 (9th Cir. 1995) (Boochever, J., concurring), commentators, *see The Debate on 2002 Federal Drug Guideline Amendments*, 14 Fed. Sen. Reptr. 123, 188-242 (Nov./Dec. 2001-Jan./Feb. 2002); *Rethinking the Crack Cocaine Ratio*, 10 Fed. Sen. Reptr. 179, 184-208 (Jan./Feb. 1998), and the Sentencing Commission. *United States v. Smith*, ___ F. Supp. 2d ___, 2005 WL 549057, at *9, 2005 U.S. Distr. LEXIS 4177, at *28 (E.D. Wis. Mar. 3, 2005).

In its 2002 Report to Congress, the U.S. Sentencing Commission suggested a change in the disparity of sentences for cocaine base and powder cocaine. The Commission reported in part the following findings: (1) the current penalties exaggerate the relative harmfulness of crack cocaine; (2) the current penalties sweep too broadly and apply most often to lower level offenders; (3) the current penalties overstate the seriousness of most crack cocaine offenses and fail to provide adequate proportionality; and (4) the current penalties' severity mostly impacts minorities.

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[2] Mr. Kimbrough acknowledges that he is required to serve the 10-year statutorily required minimum sentence under Counts One, Two, and Four and the 5-year consecutive mandatory minimum required by Count Three, for a combined minimum sentence of 15 years.

Based upon its findings, the Commission unanimously and firmly concluded "that the various congressional objectives can be achieved more effectively by decreasing substantially the 100-to-1 drug quantity ratio." United States Sentencing Commission, *Report to the Congress: Cocaine and Federal Sentencing Policy* at v-viii (May 2002), also available online at http://www.ussc.gov/reports.HTM.

" . . . [A]fter *Booker* district courts need no longer blindly adhere to the 100:1 guideline ratio." *Smith*, 2005 WL 549057, at *9, 2005 U.S. Dist. LEXIS 4177, at *28. In *Smith*, the guideline imprisonment range was determined to be 121-151 months. Under 21 U.S.C. § 841(b)(1)(A), a 10 year mandatory minimum sentence also applied. The court sentenced defendant to 18 months imprisonment followed by 5 years of supervised release, stating

> Even after modifying the advisory guideline range based on the Commission's recommendations regarding crack cocaine, I believed the range to be somewhat greater than necessary because it did not take into account defendant's good conduct since he committed this offense over four years ago, his employment history and community involvement, and his importance to his family. I concluded that it would be appropriate to impose a non-guideline sentence to allow small reductions for these factors. . . . Considering all of the § 3553(a) factors, I concluded that a sentence of 18 months was sufficient, but not greater than necessary to serve the purposes of sentencing.

Smith, 2005 WL 549057, at *10, 2005 U.S. Dist. LEXIS 4177 at *30-31. In dropping below a federal sentencing guideline range for "crack" cocaine in the case of *United States v. Mulvey*, No. 03-10075-001 (C.D. Ill. Feb. 11, 2005),

U.S. District Judge McDade made the same observation regarding the disparities,

> "Given the Draconian punishment associated with crack cocaine, to follow the guideline range for this case would go beyond what is needed to serve the purpose of sentencing. . . . Respect for the law doesn't always mean sending people to prison for as long as you can."

see Elaine Hopkins, *McDade Sentencing Below Guidelines: Judge Says this Crack Cocaine Case Merited a Discretionary Approach*, Peoria Journal Star, Inc., February 12, 2005; also available online at http://www.pjstar.com/stories/021205/TRI_B5IGJJSI.012.shtml.

Given this unfair disparity, Mr. Kimbrough respectfully asks this Court to sentence him [to the] 15-year or 180 month statutorily required minimum sentence. Such a sentence would reflect the seriousness of the offense in addition to promoting respect for the law and providing a just punishment since it would not be guided by the unjustifiable crack-powder cocaine disparity.

A sentence of the statutorily required minimum 15-years would also meet the remaining requirements of 18 U.S.C. § 3553(a)(2) as such a sentence would no doubt afford adequate deterrence to criminal conduct, protect the public form [*sic*] further crimes by Mr. Kimbrough and provide him with the opportunity to partake in many of the Bureau of Prison programs.

Respectfully submitted,

Derrick Kimbrough

By /s/ Riley H. Ross III
Of Counsel

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Position Paper was mailed this 31st day of March, 2005, to William D. Muhr, Assistant United States Attorney, 8000 World Trade Center, 101 West Main Street, Norfolk, VA 23510 and Sean C. Mitchell, Senior U.S. Probation Officer, 600 Granby Street, Suite 200, Norfolk, VA 23510.

/s/ Riley H. Ross III
Riley H. Ross III
Assistant Federal Public Defender

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

UNITED STATES OF AMERICA	)	
	)	
V.	)	CRIMINAL ACTION
	)	
DERRICK KIMBROUGH,	)	NO. 2:04cr185
	)	
Defendant.	)	
	)	

TRANSCRIPT OF PROCEEDINGS

Norfolk, Virginia

April 11, 2005

(Sentencing Hearing)

Before: THE HONORABLE RAYMOND A. JACKSON
United States District Judge

Appearances:

UNITED STATES ATTORNEY'S OFFICE
BY: WILLIAM D. MUHR, ESQUIRE
Assistant United States Attorney
Counsel for the United States

OFFICE OF THE FEDERAL PUBLIC DEFENDER
BY: GRETCHEN LYNCH TAYLOR, ESQUIRE
Counsel for the Defendant

The defendant appearing in person.

Also Present:

Sean C. Mitchell, Probation Officer

[2] THE DEPUTY CLERK: Case No. 2:04cr185, United States of America versus Derrick Kimbrough.

Mr. Muhr, is the government ready to proceed?

MR. MUHR: The government is ready, Your Honor.

THE DEPUTY CLERK: Ms. Taylor, is the defendant ready to proceed?

MS. TAYLOR: Yes, we are ready. Good morning, Your Honor.

THE COURT: Good morning, ladies and gentlemen. Have you had adequate time to prepare Mr. Kimbrough for the hearing?

MS. TAYLOR: Yes, Your Honor.

As the Court knows, Mr. Riley Ross has been representing Mr. Kimbrough throughout the pendency of this case. Mr. Ross is out of the country, and I am prepared to go forward today on his behalf.

THE COURT: Mr. Kimbrough, are you fully satisfied with the advice and counsel of Ms. Taylor in the case?

THE DEFENDANT: Yes, sir.

THE COURT: All right. You may have a seat.

The Court notes in examining the presentence report, which is the first matter the Court needs to address, there is an objection to the presentence report to the two-point enhancement for obstruction of justice and for the failure to attribute any points to the defendant for the acceptance of [3] responsibility. Have you, Mr. Muhr and Ms. Taylor, resolved these two objections?

MR. MUHR: No, Your Honor.

THE COURT: All right. Mr. Muhr, the government has the burden of proof by a preponderance of the evidence on the obstruction enhancement. Is there anything you wish to say about the obstruction enhancement?

MR. MUHR: Yes, Your Honor. I mean, obviously the Court heard the trial of Mr. Flowers and heard Mr. Kimbrough testify at that particular trial. Your Honor, it's the government's opinion that Mr. Kimbrough committed perjury when he testified at that particular trial. I listed – and I don't want to take up the Court's time, but I listed a number of things in my written brief to the Court of examples of where he was not truthful in what he was trying to tell the jury.

What it basically boiled down to is he was trying to tell the jury that all the evidence belonged to him; he, alone, was guilty; and that Mr. Flowers – none of the evidence belonged to him. He was innocent and knew nothing of this evidence. I think the evidence spoke to the contrary in this case, and of course, the jury verdict also came down on the side of guilt of Mr. Flowers, that they also did not believe Mr. Kimbrough in this.

Your Honor, in *United States versus Dunnigan*, as I stated in my written response on this, is perjurious, false [4] testimony concerning a material matter with the willful intent to provide false testimony, and I think that's what he has done, Your Honor. He has willfully presented false testimony in this Court in trying to deceive a jury in getting a jury to acquit Mr. Flowers, and clearly under, I think it's paragraph 4 of 3C1.1, that giving perjury is clearly an example of a case in which the defendant should be assessed a two-point enhancement for obstruction of justice.

Of course, obstruction of justice can occur during any portion of a case. It can occur during the investigation, during the actual trial or during the sentencing, and I think that he committed perjury in this case, Your Honor, and I would ask that the Court also find that he committed perjury and assess him a two-point enhancement.

THE COURT: Okay. Ms. Taylor.

MS. TAYLOR: Would you like me to just address the obstruction of justice issue independently?

THE COURT: I would like you to address the obstruction of justice issue, yes.

MS. TAYLOR: Yes, Your Honor.

Your Honor, of course, now, I wasn't present for the trial of Joel Flowers, as the Court and counsel for the government was, so I'm relying on Mr. Ross's notes, but I do know, and Mr. Muhr just basically said, that Mr. Kimbrough, the substance of his testimony was that he was accepting [5] responsibility for the evidence that the police found, for the gun, for the drugs, that sort of thing. It is his position, of course, that he did not commit perjury, that he told the truth and he didn't want to see an innocent man convicted, which, of course, Mr. Flowers was convicted of everything but, I believe, count two, if I'm not mistaken, one of the possession with intent to distribute counts.

So it would be Mr. Kimbrough's position that he did not commit perjury. He merely tried to do his civic duty and not let an innocent man get convicted. Unfortunately, he was not successful in that endeavor. He would ask the Court not to assess him two points for obstruction of justice. He never denied his culpability in the offense. He

merely told his position on the evidence before the Court, and he would ask you to not deem that to be perjury.

THE COURT: Mr. Muhr, the substance of your brief is that Mr. Kimbrough told the jury that all the evidence belonged to him and not to Mr. Flowers in this case, right? Now, the jury convicted Mr. Flowers of conspiracy. Is a conviction of Mr. Flowers for conspiracy inconsistent with them rejecting the testimony of Mr. Kimbrough that all the evidence was his? In other words, merely because they found that there was a conspiracy doesn't mean that the jury determined that all of the evidence did not belong to Mr. Kimbrough.

MR. MUHR: Well, Your Honor, I think it was more than [6] just some general statement that he said up there. He gave a lot of specifics, and basically what he was doing is he was trying to take every fact that could possibly incriminate Mr. Flowers and explain it away is what he was doing, and he was doing that consistently throughout.

THE COURT: I understand exactly what he did. I heard his testimony. I also heard his testimony and heard the testimony of the police officers, and as the Court recalls the testimony here, the testimony, there was a conflict in the police officers' testimony about what happened here between the two police officers as well as a conflict with Mr. Kimbrough here. So it wasn't a clean-cut he said, she said type of case that the Court had here.

Also, the Court is concerned on this enhancement that apparently the jury believed something he said because they also acquitted at the same time Mr. Flowers of one of the key charges here, that is, his possession with the intent to distribute the crack cocaine that was also in the

car. So it's not as clean-cut and clear as the Court would certainly want it to be in looking at what the jury believed in terms of what Mr. Kimbrough told them.

The Court's been thinking about this thing. That's what concerns the Court, trying to parse out what the jury rejected, what the jury believed in view of the fact the jury appeared to have credited some of his testimony about what [7] happened out there.

MR. MUHR: Well, Your Honor, clearly the main charge in this thing is the conspiracy charge, and Mr. Kimbrough was clearly, I think without a doubt, trying to convince the jury that Mr. Flowers was not in this conspiracy with him; that he didn't know anything about any of these drugs. He didn't even know anything about the gun. He's also got the 924(c) count with him saying that he was the one that had the gun. Of course, there was a lot of conflict with that. At one point he says he knew he dropped it. Then later he says no, he didn't, though he pointed out where he dropped it.

I think he clearly was trying to convince the jury that Mr. Flowers had nothing to do with any of those counts in that indictment and was trying to explain away all the evidence that would incriminate Mr. Flowers. In doing that, I think he committed perjury by doing that, by telling them that he had nothing to do with it, by saying the various things, particularly like, say, regarding that gun.

If you remember, on direct he said he felt it slip and hit the ground. He actually heard it hit the ground. Then he said because it was a rip in the holster. Well, there was no rip in the holster. Then when I cross-examined him, then he says, well, no, I didn't know it dropped out then. The only time I recognized it was gone is when that

strange guy was by my door and I pulled the gun out. But yet at the same time [8] when he was on direct, he pointed out exactly where he dropped it, though later he says he didn't know he dropped it. So he's trying to separate that gun from Mr. Flowers who had that gun in his possession when he was running from the police, along with all the drugs and all the other evidence, and I think in doing that, Your Honor, he tried to convince the jury of something that wasn't true, and in that he committed perjury.

THE COURT: All right. So the specific statement you now identify is the fact that Mr. Flowers – Mr. Kimbrough testifies that he had the firearm, that he dropped the firearm here, and Mr. Flowers did not have the firearm.

MR. MUHR: He clearly said to that, and I gave the example – in my written response I gave various examples, and that was one of them in there.

THE COURT: Well, that's one of the clearest ones, and I think Mr. Flowers was convicted of being in possession of the firearm.

MR. MUHR: Yes, he was. He was convicted of the 924(c), Your Honor.

THE COURT: Okay. Thank you.

In order to make a determination that perjury occurred here, the government has to establish by a preponderance of the evidence that the defendant gave testimony under oath concerning a material matter with willful intent to deceive. Okay? And the Court has to in the sentencing [9] identify what the specific factual statements are.

I think the record will reflect for the purposes of this perjury enhancement here that the defendant did provide testimony under oath. His testimony did concern a material matter that had to do with who possessed the firearm at the scene of the crime. That's inescapable.

The next element is whether he did it with willful intent to deceive rather than as a result of confusion, mistake or faulty memory. There is no mistake about Mr. Kimbrough's testimony here. The Court heard Mr. Kimbrough's testimony very clearly. He was not confused. He did not have any faulty memory. The Court is persuaded that Mr. Kimbrough did want to persuade the jury that he in fact had this firearm and not Mr. Flowers. To that extent, the Court would have to find, and the Court will conclude, that he did in fact intend to deceive or mislead the jury. The jury specifically rejected that testimony.

The Court struggled with this whole issue here, whether the Court should find he in fact committed perjury, but in this instance, the Court has just simply come to the conclusion, in looking at these elements, that he committed perjury on that particular point, and so the Court is going to find that he did in fact commit perjury with respect to who had the firearm.

For that reason, the Court is going to overrule the [10] objection to the two-point enhancement for obstruction of justice. However, that does not end the Court's inquiry, because the Court next has to determine whether he should be denied two points for acceptance of responsibility.

As the law goes, it is generally inconsistent with acceptance of responsibility to have two points or any points for obstruction of justice in this case. And in this

case, the Court has said that the two points for obstruction of justice should remain.

The Court is aware of *United States versus Murray* wherein the issue of one receiving points for acceptance of responsibility in the face of obstruction was considered. The question becomes, and I will give counsel a chance to comment on it, whether the defendant still should receive the two points for acceptance of responsibility notwithstanding the obstruction enhancement.

All right. Mr. Muhr. – no, you don't go first. I think it's Ms. Taylor who goes first.

MS. TAYLOR: Your Honor, I think this case does present an extraordinary circumstance. I can't think of a case and in doing an informal poll of my office, no one else in my office could think of a case where someone who intended to plead guilty turned down a government offer to drop a 924(c) mandatory minimum 60-month charge and still pled guilty to it. It's one thing if they wanted to try to go to trial and try to [11] prove their innocence, but Mr. Kimbrough has maintained from the beginning that, no, he was guilty of each and every one of his charges. He maintained also that Mr. Flowers was not.

But I think this is a case that although obstruction of justice and acceptance are linked in a lot of cases, in this case it's different, because his obstruction basically is due to the fact of him accepting responsibility. Because he wanted to go on that stand and tell the jury, no, he was responsible for everything. He turned down a government offer to plead guilty, just so he could plead guilty to each and every count because he felt that he was guilty and that was the right thing to do.

So I think this does present an extraordinary case here, a case where a defendant has gone out of his way to not only plead guilty to every count, but then also give testimony that he was guilty of each and every count.

THE COURT: But in doing that, then, the government is going to argue, yes, that's true, he wants to accept of [*sic*] responsibility, but he in fact misled the jury in trying to accept responsibility.

MS. TAYLOR: I know that's their position, Your Honor, and I think the probation officer in the presentence report makes it very clear that one hinges on the other. You know, the whole point of denying Mr. Kimbrough acceptance of responsibility is obviously that testimony, but we would [12] maintain that that testimony does demonstrate further his extraordinary responsibility here, because that was the substance of his testimony, to take credit for absolutely everything. So this presents a unique case, Your Honor, and I ask you to grant him a two-level reduction.

THE COURT: Okay. Fine.

MR. MUHR: Your Honor, as the Court noted on this, the guideline purely does say when one receives obstruction of justice that to receive acceptance of responsibility is not the normal course of how it should be done.

I think what the defendant is doing in this is he's calling his case an extraordinary case because he pled guilty to everything while in a plea agreement he would not have to have pled guilty; so, therefore, he really accepted responsibility. But you can't view these things separate from each other, you have to view them together.

He clearly got up there and in supposedly accepting responsibility misled the jury in his testimony in this.

I think, Your Honor, in *United States v. Murray* it's a case that's almost on point in this. It just has to do with a different offense than this, being a bank robbery. In that case, Your Honor, when Johnson took the stand in testifying at Murray's trial, earlier she had given a written confession about her involvement in the bank robberies and then his involvement in the bank robberies, and then denied those [13] confessions later on the stand and denied her signature on that written confession, and it was found that, therefore, she did not admit to all relevant evidence in this case. And I think that's what the defendant has done here, too.

In acceptance of responsibility, you have got to admit to all relevant evidence in this case, and that includes his conspiracy with Mr. Flowers, his involvement with Mr. Flowers involving the drugs and the guns and the other incriminating evidence, and I think the Court in *Murray* got it correct in not giving the defendant Johnson acceptance of responsibility for committing perjury on the stand, and I would ask in this case also, Your Honor, that he not receive acceptance of responsibility. One should not be rewarded, Your Honor, for committing perjury.

THE COURT: All right. Anything further you wish to say in rebuttal, Ms. Taylor?

Ms. Taylor, do you have any case law you want to cite to the Court?

MS. TAYLOR: No, sir, just the guidelines itself, that this would be an extraordinary case where the defendant has accepted responsibility.

THE COURT: Mr. Muhr, are you aware of exceptions to the situation where the defendant gets an enhancement for obstruction of justice yet receives acceptance of responsibility? Are you aware there are exceptions to that [14] general rule?

MR. MUHR: Your Honor, I know that the guidelines speak of that. It does not give an example, but as I said in my written brief, I think an example would be where somebody, say, committed obstruction of justice and then later did an act in order to try to amend for it. For example, if you committed obstruction at the investigation stage of a case but then pleaded guilty and testified against your codefendant, that would be an extraordinary case, I think, where one could then receive both. But in this case, there was no amends of any kind, and I don't see where it would fall out of the extraordinary in this case.

THE COURT: Okay. The case law doesn't offer a whole lot of guidance on when the Court should deem it appropriate to grant acceptance of responsibility notwithstanding obstruction of justice in a case.

In this case, the defendant apparently was confronted with a four-count indictment and had an opportunity to plead guilty pursuant to a plea agreement to counts in the indictment which did not include consecutive imposition of punishment for the gun count. The defendant rejected that plea agreement. Instead, came in and entered a plea of guilty to all four counts and indicated that he wished to accept responsibility for the entire offense and came forward and testified on behalf of the codefendant.

[15] In testifying for the codefendant, the defendant did in fact indicate that he accepted responsibility for all of the criminal conduct involved, but in the process of doing

it, the Court found that the defendant in fact misled the jury, that he in fact committed perjury about part of what he did.

The notion of acceptance of responsibility includes the proposition that one fully accepts the role he or she played in the commission of an offense. It is inconsistent with acceptance of responsibility to misle[a]d or otherwise commit perjury in relating the material matters involved in the offense.

The Court's determined that the Court is not going to grant the two points for acceptance of responsibility. Once again, the Court labored with the thoughts of doing just that, going the opposite direction, before it came in here, but the Court has determined the Court is not going to do that. On balance, the Court is not going to grant the two points for acceptance of responsibility. So the Court is going to overrule the objection.

All right. Any more objections to the presentence report?

MS. TAYLOR: No objections, Your Honor. I would just have further argument as to the appropriate range, but no more objections.

THE COURT: Okay. Well, we will get to that.

[16] The Court wants to make a finding here in this case with respect to the advisory sentencing guidelines in this case. Having overruled the objections to the presentence report, the Court finds that the criminal history category of the defendant in this case is II and the offense level is 34.

Now, the guideline range with respect to these counts indicate that the guideline sentencing range is 168 to 210, plus 60 months consecutive.

Would you stand up for a second, please, Mr. Kimbrough.

Mr. Kimbrough, the Court has just articulated the advisory sentencing guidelines in this case, but the Court wishes to advise you that's just one factor of many the Court is to consider in this case. The Court will have more to say about the advisory guideline range in a few minutes.

You have a right to call witnesses this morning to testify in this case about what the appropriate sentence should be. You have a right to put on witnesses or to testify yourself, if you desire to do so. If you testify under oath, you will be subject to cross-examination. If you make an unsworn statement from the podium, you will not be subject to cross-examination. You have an opportunity to remain silent, if you wish to do so.

Does he have witnesses he wishes to call, Ms. Taylor?

MS. TAYLOR: No, Your Honor.

[17] THE COURT: Does he wish to make a sworn or unsworn statement?

MS. TAYLOR: I don't believe he has any statements he needs to make, Your Honor.

THE DEFENDANT: No.

THE COURT: Are we certain of that?

MS. TAYLOR: Yes, Your Honor. He doesn't have any statements he wishes to make.

THE COURT: All right. Do you have any arguments you wish to make, Mr. Muhr?

MR. MUHR: Your Honor, I would ask that the Court adopt the recommendation of the guidelines in this case. The guidelines themselves, I mean, they take in many factors, including many of the factors in section 3553, which the Court also has to consider, without question, in this case, and I would ask that the Court do adopt that. I think that would be a reasonable sentence in the case so that I would ask the Court to sentence him somewhere within the guideline range, and of course, plus the 60 months for the 924(c).

THE COURT: Anywhere from 19 and 22 years.

MR. MUHR: Yes, sir.

THE COURT: You think that's an appropriate sentence?

MR. MUHR: I think it's a reasonable sentence, Your Honor.

THE COURT: All right. Thank you.

[18] All right. Ms. Taylor.

MS. TAYLOR: Your Honor, the defendant would ask you to sentence him to no more than the statutorily minimum required sentence of 180 months, and he does this based on several reasons.

The first reason, I think Mr. Ross did a good job of outlining in his position paper, and that is the crack

versus powder disparity. Even the U. S. Sentencing Commission admitted in its 2002 report to Congress that the current drug penalties exaggerate the relative harmfulness of crack cocaine, that they sweep too broadly and apply most often to lower-level offenders, they overstate the seriousness of most crack cocaine offenses and fail to provide adequate proportionality, and the current penalty's severity mostly impacts minorities, which, of course, for the record Mr. Kimbrough is one.

We would ask you if the Sentencing Commission finds that the current penalties for crack cocaine are unduly harsh, then that I think goes right to the 3553 factors, and which of those factors would then apply to that? Perhaps the need to avoid unwarranted sentencing disparity because if – Mr. Kimbrough, he had actually more powder cocaine than he had crack cocaine in his possession, and certainly if he had had all powder cocaine, then he would be treated much less harshly under the guidelines. I believe Mr. Ross calculated that the guideline range would be 30 to 37 months. I guess that would [19] not include, obviously, the 60 months in addition on the 924(c). But obviously that's a tremendous disparity here.

I think it also goes to the factor of needing to promote respect for the law, because why would it promote respect to give someone a sentence so much harsher because some of the cocaine in his possession had been cooked up into crack form? So I would ask the Court to take that into account in fashioning a just punishment for Mr. Kimbrough.

In addition, when we look at Mr. Kimbrough's presentence report, as far as the nature and characteristics of this defendant, we look at his criminal history. He's got a

couple minor driving offenses, a couple failure to appears and two misdemeanor drug offenses. He was not a convicted felon until this case. So I think taking that into account also warrants a lesser punishment.

If you look at his presentence report, you can see that he has a work history, trade history. It's actually pretty unremarkable, his presentence report, and I think that's something to be commended. The less said the better in some of these reports. It's when you get the ones that are two inches thick that you have something to worry about.

Mr. Kimbrough's record, he's been essentially a law-abiding citizen for most of his life, so I would ask the Court to take that into account as well, and the fact that this was basically a state drug interdiction, a state case where the [20] police officers approached a car and because they saw someone crouched near it, and then uncovered cocaine and a firearm that fell from a codefendant's possession.

And finally, I think you could take into account, even if it technically didn't qualify for acceptance of responsibility under the guidelines purposes, you know, Mr. Kimbrough did come in here and plead guilty to every single one of these charges. Even when perhaps the gun charge would have been the weakest, he still accepted responsibility on that charge as well. So what I would ask you to do, Your Honor, is sentence him to 120 months on the drug charges concurrently and then consecutively 60 months on the 924(c).

Thank you.

THE COURT: All right. If you will come to the podium with Ms. Taylor, Mr. Kimbrough.

Is there anything you wish to say? No, that's right. Mr. Kimbrough is not making a comment. Sorry.

MS. TAYLOR: Yes, sir.

THE COURT: All right. The Court is required to impose a sentence in this case to do several things: To reflect the seriousness of the offense, to afford adequate deterrence to Mr. Kimbrough's criminal conduct, to protect the public from further crimes committed by the defendant, to provide the defendant with needed educational or vocational training, medical care or other correctional treatment in the [21] most effective way.

One thing the statute tells the Court to do. That in fashioning a sentence, the Court is not to impose a sentence that is greater than necessary to accomplish the factors I just outlined. It is the Court's humble view that to impose a sentence of 19 to 22 years in this case is ridiculous. It imposes more punishment, given the record here, than is necessary to accomplish what needs to be done.

While the Congress, the Sentencing Commission recognizes that crack cocaine has not caused the damage that the Justice Department alleges it has, the Justice Department has yet to recognize the disproportionate and unjust effect that crack cocaine guidelines have in sentencing. This case is another example of how the crack cocaine guidelines are driving the offense level to a point higher than is necessary to do justice in this case.

In fashioning its sentence, the Court has considered the nature and the circumstances of this offense. Number one, this defendant and another defendant were caught sitting in a car with some crack cocaine and powder by two police officers – that's the sum and substance of it – with a

firearm. The Court understands how the offense was committed. The Court heard the facts in this particular case.

The Court has considered the history and characteristics of the defendant. The defendant in this case [22] does have a record of criminal violations, but it's a record involving misdemeanors, and as counsel points out, until this case, he has not had a felony conviction.

The Court is required to consider factors other than what the sentencing guidelines recommend because the sentencing guidelines constitute only one factor. The sentencing guidelines as calculated excludes consideration of a number of factors that Title 18, United States Code, 3553(a) tells the Court that the Court should consider.

The sentencing guidelines do not consider, in coming up with that range of 14 to 19 months, plus 60 months consecutive, do not consider the history and characteristics of the defendant. The sentencing guidelines do not consider the education and vocational skills of the defendant. It does not look at family ties and background. It does not look at military contributions. It excludes all of those. Yet the sentencing factors other than the guidelines says the Court should consider those.

Given the fact that the sentencing guidelines has come up with this guideline range excluding all the factors the law says the Court should consider, the Court cannot follow in rote fashion the sentencing guideline recommendation, and the Court will not follow it.

First of all, in terms of the defendant's criminal history, the Court has considered the criminal history, what it [23] was before he got involved in this case.

The Court also considers that this defendant at one time served in combat in Desert Storm and honored his country and received an honorable discharge, and that for [the] most part since he was honorably discharged, the defendant has been a construction worker and has found meaningful employment someplace. The sentencing guidelines say don't consider that, but the statute says consider it, so the Court will consider it.

The Court will also consider his employment record, his military contributions, his past history. The Court also considers significantly the fact that the crack cocaine involved in this case does in fact exaggerate the advisory sentencing guideline involved in this case.

It's amazing that when the Court goes back and calculates the offense in this case using powder cocaine, because we are dealing with cocaine at the end of the day in this case, the level, the guideline range comes down so significantly that it's unbelievable, so the Court has noted that in imposing the penalties in this case. So the Court believes should it follow the advisory guidelines, the penalty imposed would be clearly inappropriate and greater than necessary to accomplish what the statute says you should in fact accomplish in this case.

Given all of those factors and the Court's need to [24] avoid imposing an unwarranted disproportionate sentence, the Court will sentence this defendant as follows:

Pursuant to the Sentencing Reform Act of 1984, it's the judgment of the Court the defendant, Derrick Kimbrough, is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total of 180 months. That's 15 years, which is clearly long enough under the circumstances. As a matter of fact, it's

the Court's view that it's too long, but the Court is bound by the mandatory minimum of ten years on three of these counts.

This 180 months consists of 120 months on count one, 120 months on count two, 120 months on count three, to be served concurrently, and a term of 60 months on count four to be served consecutively.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of five years. This term consists of five years on count one, two and four, and three years on count three, all to run concurrently.

You shall refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on supervised release and at least two periodic drug tests thereafter as directed by the probation officer.

You shall also comply with the following additional conditions: You shall participate in a drug education program approved by the United States Probation Office with partial [25] cost to be paid by you, as directed by the probation officer.

You shall pay for the support of your minor children, as directed by the probation officer. In the absence of any court-ordered child support payments, the Court will establish an amount or schedule of payments based upon your financial circumstances.

The Court has looked at your negative net worth, your lack of liquid assets and earning potential, and the Court finds you are not capable of paying a fine, but you are required to pay the mandatory special assessment of $100 on each count of conviction. Accordingly, you shall pay a

$100 special assessment on each of counts one, two, three and four, for a total special assessment of $400.

No restitution is involved. No fine is involved here.

Any balance remaining unpaid on your special assessment at the inception of your supervision shall be paid by you in installments of not less than $50 per month until paid in full. Said payments shall commence 60 days after your supervision begins.

You waived your right to appeal the sentence in this case as long as it was within the statutory maximum.

Is that still the case, Ms. Taylor?

MS. TAYLOR: He didn't waive –

MR. MUHR: He did not have a plea agreement.

[26] THE COURT: Oh, I'm sorry. That's right. He pled to everything.

Mr. Kimbrough, you have the right to appeal this sentence imposed upon you by this Court. If you wish to appeal, you must talk to Ms. Taylor and note your appeal of the Court's judgment within 10 days of the date the Court imposes it, which is today.

Are there any other matters to come before the Court, Mr. Muhr?

MR. MUHR: Your Honor, in all due respect, I have to put on the order the objection of going outside the guidelines as being unreasonable.

THE COURT: Mr. Muhr, you know, it almost – sure, Mr. Muhr.

MR. MUHR: Yes, sir.

THE COURT: Going outside the guidelines? This is post-Booker. The guidelines are advisory. Any sentence outside the advisory guidelines are not automatically unreasonable.

I realize you are doing your job, but I find it absolutely ridiculous the Department of Justice demands the heart and lungs, feet, and everything else in a case on these facts.

MR. MUHR: Yes, sir.

THE COURT: Anything else, Ms. Taylor?

[27] MS. TAYLOR: No, sir, Your Honor. Thank you.

THE COURT: All right. Court will be in recess until further notice.

(This hearing concluded at 12:15 p.m.)

* * *

CERTIFICATION

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ X Sharon B. Borden X
Sharon B. Borden, RMR, FCRR

X June 8, 2005 X
Date

UNITED STATES DISTRICT COURT
Eastern District of Virginia
Norfolk Division

UNITED STATES
OF AMERICA

v.

Case Number
2:04CR00185-002

DERRICK KIMBROUGH,

USM Number 60156-083

Defendant.

JUDGMENT IN A CRIMINAL CASE

(Filed Apr. 14, 2005)

The defendant, DERRICK KIMBROUGH, was represented by Riley H. Ross, III, Esquire.

The defendant pleaded guilty to count(s) 1, 2, 3, and 4. Accordingly, the defendant is adjudged guilty of the following count(s), involving the indicated offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21:846	**CONSPIRACY TO POSSES[S] WITH INTENT TO DISTRIBUTE AND DISTRIBUTE CRACK COCAINE (Felony)**	**5-24-04**	**1**
21:841(a)(1) and (b)(1)(A)(iii) and 18:2	**POSSESS WITH INTENT TO DISTRIBUTE COCAINE BASE (Felony)**	**5-24-04**	**2**

21:841(a)(1) and (b)(1)(C) and 18:2	**POSSESS WITH INTENT [TO] DISTRIBUTE COCAINE (Felony)**	**5-24-04**	**3**
18:924(c)(1) and 18:2	**POSSESSION OF A FIREARM IN FURTHERANCE OF A DRUG TRAFFICKING CRIME (Felony)**	**5-24-04**	**4**

As pronounced on April 11, 2005, the defendant is sentenced as provided in pages 2 through 7 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of any material change in the defendant's economic circumstances.

Signed this 14th day of April, 2005.

/s/ Raymond A. Jackson
Raymond A. Jackson
United States District Judge

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **ONE HUNDRED EIGHTY (180) MONTHS**.

This term consists of One Hundred Eighty (180) Months on Count 1, One Hundred Twenty (120) Months on Count 2, One Hundred Twenty (120) Months on Count 3, **all to be served concurrently**; and Sixty (60) Months on Count 4, **to be served consecutively**.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

c: 4/15/05 TL (date of distribution)
P.O. (2)
Mshl. (4)
U.S.Atty.
U.S.Coll.
Dft. Cnsl.
PTS
Financial
Registrar
ob

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **FIVE (5) YEARS**.

This term consists of Five (5) Years on Count 1, Five (5) Years on Count 2, Three (3) Years on Count 3, and Five (5) Years on Count 4, **all to run concurrently**.

The Probation Office shall provide the defendant with a copy of the standard conditions and any special conditions of supervised release.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

While on supervised release, the defendant shall not commit another federal, state, or local crime.

While on supervised release, the defendant shall not illegally possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

While on supervised release, the defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

STANDARD CONDITIONS OF SUPERVISED RELEASE

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below):

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.

2) The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the Probation Officer at least ten days prior to any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and

shall permit confiscation of any contraband observed in plain view of the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

While on supervised release, pursuant to this Judgment, the defendant shall also comply with the following additional conditions:

1) The defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on supervised release and at least two periodic drug tests thereafter, as directed by the probation officer.

2) The defendant shall participate in a program approved by the Probation Office for substance abuse, which program may include residential treatment and testing to determine whether the defendant has reverted to the use of drugs or alcohol, with partial cost to be paid by the defendant, all as directed by the probation officer.

3) The defendant shall pay for the support of his minor children in any amount ordered by any social service agency or court of competent jurisdiction. In the absence of any such order, payments are to be made on a schedule to be determined by the Court at the inception of supervision, based on defendant's financial circumstances.

4) Any balance that remains unpaid on the special assessment at the inception of supervision shall be paid by the defendant in installments of not less than $50.00 per month, until paid in full. Said payments shall commence sixty (60) days after defendant's supervision begins.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the total monetary penalties under the schedule of payments on Schedule of Payment – Sheet 6.

Count	Assessment	Fine	Restitution
1	$100.00		
2	$100.00		
3	$100.00		
4	$100.00		
Total	**$400.00**		

FINE

No fines have been imposed in this case.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

Any balance that remains unpaid on the special assessment at the inception of supervision shall be paid by the defendant in installments of not less than $50.00 per month, until paid in full. Said payments shall commence sixty (60) days after defendant's supervision begins.

The special assessment shall be due in full immediately.

Any special assessment, restitution, or fine payments may be subject to penalties for default and delinquency.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prison's Inmate Financial Responsibility Program, are made to the Clerk of the Court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
Eastern District of Virginia
Norfolk Division

UNITED STATES OF AMERICA

v.

Case Number 2:04CR00185-002

DERRICK KIMBROUGH,

USM Number 60156-083

Defendant.

***AMENDED**
JUDGMENT IN A CRIMINAL CASE

(Filed Apr. 22, 2005)

The defendant, DERRICK KIMBROUGH, was represented by Riley H. Ross, III, Esquire.

The defendant pleaded guilty to count(s) 1, 2, 3, and 4. Accordingly, the defendant is adjudged guilty of the following count(s), involving the indicated offense(s):

Title & Section	Nature of Offense	Date Offense Ended	Count Number(s)
21:846	**CONSPIRACY TO POSSES[S] WITH INTENT TO DISTRIBUTE AND DISTRIBUTE CRACK COCAINE (Felony)**	**5-24-04**	**1**
21:841(a)(1) and (b)(1)(A)(iii) and 18:2	**POSSESS WITH INTENT TO DISTRIBUTE COCAINE BASE (Felony)**	**5-24-04**	**2**

21:841(a)(1) and (b)(1)(C) and 18:2	**POSSESS WITH INTENT [TO] DISTRIBUTE COCAINE (Felony)**	**5-24-04**	**3**
18:924(c)(1) and 18:2	**POSSESSION OF A FIREARM IN FURTHERANCE OF A DRUG TRAFFICKING CRIME (Felony)**	**5-24-04**	**4**

As pronounced on April 11, 2005, the defendant is sentenced as provided in pages 2 through 7 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of any material changes in the defendant's economic circumstances.

Signed this 22nd day of April, 2005.

/s/ Raymond A. Jackson
Raymond A. Jackson
United States District
Judge

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **ONE HUNDRED EIGHTY (180) MONTHS**.

This term consists of *One Hundred Twenty (120) Months on Count 1, One Hundred Twenty (120) Months on Count 2, One Hundred Twenty (120) Months on Count 3, **all to be served concurrently**; and Sixty (60) Months on Count 4, **to be served consecutively**.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

c: 4-22-05 MN (date of distribution)
P.O. (2)
Mshl. (4)
U.S.Atty.
U.S.Coll.
Dft. Cnsl.
PTS
Financial
Registrar
ob

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **FIVE (5) YEARS**.

This term consists of Five (5) Years on Count 1, Five (5) Years on Count 2, Three (3) Years on Count 3, and Five (5) Years on Count 4, **all to run concurrently**.

The Probation Office shall provide the defendant with a copy of the standard conditions and any special conditions of supervised release.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

While on supervised release, the defendant shall not commit another federal, state, or local crime.

While on supervised release, the defendant shall not illegally possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

While on supervised release, the defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

STANDARD CONDITIONS OF SUPERVISED RELEASE

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below):

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.

2) The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the Probation Officer at least ten days prior to any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and

shall permit confiscation of any contraband observed in plain view of the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

While on supervised release, pursuant to this Judgment, the defendant shall also comply with the following additional conditions:

1) The defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on supervised release and at least two periodic drug tests thereafter, as directed by the probation officer.

2) The defendant shall participate in a program approved by the Probation Office for substance abuse, which program may include residential treatment and testing to determine whether the defendant has reverted to the use of drugs or alcohol, with partial cost to be paid by the defendant, all as directed by the probation officer.

3) The defendant shall pay for the support of his minor children in any amount ordered by any social service agency or court of competent jurisdiction. In the absence of any such order, payments are to be made on a schedule to be determined by the Court at the inception of supervision, based on defendant's financial circumstances.

4) Any balance that remains unpaid on the special assessment at the inception of supervision shall be paid by the defendant in installments of not less than $50.00 per month, until paid in full. Said payments shall commence sixty (60) days after defendant's supervision begins.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the total monetary penalties under the schedule of payments on Schedule of Payment – Sheet 6.

Count	Assessment	Fine	Restitution
1	$100.00		
2	$100.00		
3	$100.00		
4	$100.00		
Total	**$400.00**		

FINE

No fines have been imposed in this case.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

Any balance that remains unpaid on the special assessment at the inception of supervision shall be paid by the defendant in installments of not less than $50.00 per month, until paid in full. Said payments shall commence sixty (60) days after defendant's supervision begins.

The special assessment shall be due in full immediately.

Any special assessment, restitution, or fine payments may be subject to penalties for default and delinquency.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prison's Inmate Financial Responsibility Program, are made to the Clerk of the Court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	
DERRICK KIMBROUGH,	)	2:04-CR-00185-002
	)	
Defendant.	)	
	)	

NOTICE OF APPEAL

(Filed May 12, 2005)

Notice is hereby given that the UNITED STATES OF AMERICA, plaintiff in the above-named case, appeals to the United States Court of Appeals for the Fourth Circuit from the Judgment and the Amended Judgment entered on April 14 and April 22, 2005, respectively, pursuant to 18 U.S.C. § 3742(b) and 28 U.S.C. § 1291.

Respectfully submitted,

Paul J. McNulty
United States Attorney

By: /s/ W D Muhr
William D. Muhr
Assistant United States Attorney
101 West Main Street, Suite 8000
Norfolk, Virginia 23510
(757) 441-6331

CERTIFICATE OF SERVICE

I, William D. Muhr, hereby certify that on May 12th, 2005, I caused a copy of the foregoing pleading to be sent by First Class U.S. Mail, proper postage prepaid, to:

Riley H. Ross III, Esq.
150 Boush Street, Suite 403
Norfolk, Virginia 23510

/s/ W D Muhr
William D. Muhr
Assistant United States Attorney

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 05-4554

UNITED STATES OF AMERICA,

Plaintiff - Appellant,

versus

DERRICK KIMBROUGH,

Defendant - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Raymond A. Jackson, District Judge. (CR-04-185)

Submitted: November 15, 2005 Decided: May 9, 2006

Before WIDENER, WILLIAMS, and MOTZ, Circuit Judges.

Vacated and remanded by unpublished per curiam opinion.

Paul J. McNulty, United States Attorney, Michael J. Elston, Assistant United States Attorney, Alexandria, Virginia, for Appellant. Frank W. Dunham, Jr., Federal

Public Defender, Alexandria, Virginia; Riley H. Ross, III, Assistant Federal Public Defender, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Norfolk, Virginia; Frances H. Pratt, Research and Writing Attorney, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Alexandria, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

The Government appeals the district court's imposition of a sentence outside of the United States Sentencing Guidelines range based, in part, on the district court's disagreement with the disparity between sentences for crack and powder cocaine violations. We have jurisdiction to review the sentence pursuant to 18 U.S.C.A. § 3742 (West 2000). We review post-Booker sentences for reasonableness. United States v. Hughes, 401 F.3d 540, 546-47 (4th Cir. 2005).

Derrick Kimbrough pleaded guilty to distributing fifty or more grams of crack cocaine, distributing cocaine, conspiring to distribute fifty grams or more of crack cocaine, and possessing a firearm in connection with a drug trafficking crime. The sentencing guideline range was 168 to 210 months imprisonment for the drug counts and 60 consecutive months for the firearm count. Based, in part, on the district court's disagreement with the sentencing disparity for crack and powder cocaine violations, the district court sentenced Kimbrough to 120 months on each of the three drug violations, to be served concurrently, and

sixty months on the firearms charge, to be served consecutively. According to our recent decision in United States v. Eura, 440 F.3d 625 (4th Cir. 2006), a sentence that is outside the guidelines range is per se unreasonable when it is based on a disagreement with the sentencing disparity for crack and powder cocaine offenses. Because the district court concluded that the crack to powder cocaine disparity warranted a sentence below the applicable sentencing guideline range, we are constrained to vacate Kimbrough's sentence and to remand the case for resentencing. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid in the decisional process.

VACATED AND REMANDED

JUDGMENT

FILED: May 9, 2006

UNITED STATES COURT OF APPEALS

for the

Fourth Circuit

No. 05-4554
CR-04-185

UNITED STATES OF AMERICA

Plaintiff - Appellant

v.

DERRICK KIMBROUGH

Defendant - Appellee

Appeal from the United States District Court for the Eastern District of Virginia at Norfolk

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In accordance with the written opinion of this Court filed this day, the Court vacates the judgment of the District Court. This case is remanded to the District Court for further proceedings consistent with the Court's opinion.

A certified copy of this judgment will he provided to the District Court upon issuance of the mandate. The judgment will take effect upon issuance of the mandate.

/s/ Patricia S. Connor
CLERK

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
June 6, 2006

No. 05-4554
CR-04-185

UNITED STATES OF AMERICA

Plaintiff - Appellant

v.

DERRICK KIMBROUGH

Defendant - Appellee

On Petition for Rehearing En Banc

The appellee's petition for rehearing en banc was submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc,

IT IS ORDERED that the petition for rehearing en banc is denied.

Entered for a panel composed of Judge Widener, Judge Williams, and Judge Motz.

For the Court,

/s/ Patricia S. Connor
CLERK

(ORDER LIST: 551 U.S.)

MONDAY, JUNE 11, 2007

* * *

CERTIORARI GRANTED

* * *

06-6330 KIMBROUGH, DERRICK V. UNITED STATES

06-7949 GALL, BRIAN M. V. UNITED STATES

The motions of petitioners for leave to proceed *in forma pauperis* are granted and the petitions for writs of certiorari are granted.

* * *